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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOAN MAHONEY et al., Plaintiffs and Respondents, v. GEORGIA-PACIFIC, LLC, Defendant and Appellant.	A122038 (San Francisco County Super. Ct. No. CGC-06-458140)

Plaintiff Joan Mahoney contracted mesothelioma from using asbestos-containing products in her family construction business. She and her husband, plaintiff Daniel Mahoney, sued numerous manufacturers of those products, including defendant Georgia-Pacific, LLC (GP). All defendants settled except GP, which opted to proceed to jury trial. The jury returned a verdict for plaintiffs for $20,050,000. For reasons we shall explain, the trial court reduced the verdict and entered judgment for $6,289,544.

GP contends that plaintiffs failed to introduce sufficient evidence of causation, that their counsel committed prejudicial misconduct in closing argument to the jury, and that the trial court should have granted a new trial on the issue of damages. We disagree. Plaintiffs established that exposure to GP's asbestos-containing product was a substantial factor in causing Joan Mahoney's mesothelioma. As we explain below, there was no prejudicial misconduct during closing argument, and the jury's verdict was not the product of inflamed passion or prejudice. The trial court did not abuse its discretion by

denying a new trial on the entire damage component as requested by GP and granting a new trial limited only to medical expenses. Accordingly, we affirm.

I. FACTS

We view the facts in the light most favorable to the verdict, and resolve all evidentiary conflicts in favor of plaintiffs as prevailing parties. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687; see *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; see also *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259.)

Plaintiffs started a family construction business in South Lake Tahoe in 1971. The company built custom homes and did remodeling. At the time, plaintiffs had three small children.[1] Joan worked as the bookkeeper for the business, but was also involved in actual construction.

Joan's tasks included using a knife to apply joint compound at the seams between drywall, allowing it to dry, sanding the compound smooth, reapplying compound, and sanding again. This sanding process would take an hour. The sanding process would create dust that would fill the room, float in the air, and get into Joan's clothes, hair, and nose. The dust would be "everywhere."

Joan was also responsible for cleaning the new or remodeled houses for inspection. This work involved sweeping up the dust. She would spend from three to four hours cleaning each house.

Joan testified that between 1971 and 1979 she spent seven out of 12 months doing construction work. During that time the family business built or remodeled just under 100 houses. She engaged in the process of sanding the joint compound 50 or more times, and cleaned up almost all of the dust in under 100 houses. This testimony was corroborated by that of plaintiffs' children.

Joan used joint compound "quite often." She used mostly GP joint compound because it was most readily available at Meeks Lumber. She used GP's joint compound

[1] We will henceforth refer to plaintiffs as "Joan" and "Daniel." We do solely for the purposes of clarity and stylistic convenience, and intend to imply no improper familiarity or disrespect.

"dozens and dozens" of times throughout the 70's. Plaintiffs' daughter Deborah recalled that Joan used the GP product "predominantly." Plaintiffs' sons Sean and Danny recalled that Joan used GP, Bondex, and Kaiser Gypsum joint compounds. Sean recalled that Joan used "mostly" GP and Bondex because they were the strongest. Sean also testified he had "no doubt" that Joan used GP products well over 50 times. Joan testified she did not use Bondex very often because it was difficult to obtain.

It is undisputed that GP joint compound contained asbestos during the time Joan used it in her family construction business.

In March 2006, Joan began to feel pressure on her lungs and had difficulty breathing. She experienced pain and had fluid in her lungs. She was "very scared." She lost 45 pounds. She had seven tumors. In August 2006 she was diagnosed with diffuse malignant mesothelioma, which is virtually always fatal. As a result of the cancer, Joan continued to lose weight. She became ill from chemotherapy. She could no longer work. She could no longer perform the normal activities of daily living, including driving and swimming. She and Daniel had moved to Phoenix to be closer to their grandchildren, but there were many activities she could no longer do with the grandchildren—including swimming, fishing, and camping. Before the cancer, Joan and Daniel were always active and busy, had fun, laughed and played, visited and traveled, and were described as "never home." After the cancer, "It all came to a halt."

In June 2006, two to three months before Joan was told she had incurable mesothelioma, Daniel, Joan's husband of 42 years, had a severe stroke. He was paralyzed on the right side and suffered from aphasia, meaning he could not speak. Joan cooked and served him three meals a day, brought him drinks, washed his clothes, and gave him physical therapy. Joan's cancer seriously impaired her ability to care for Daniel. He needed home nursing care, including changing diapers and catheters, and lifting him out of bed, all of which Joan was no longer strong enough to do.

Joan's medical records from June 2006 showed a progressive shortness of breath, pleuritic pain, and fluid in the pleura. Records of the next month showed that Joan could not conduct the normal activities of daily living due to pain and the inability to breathe

deeply. By August 2006, pleural fluid had been withdrawn three times and Joan had suffered a "speedy" weight loss of 15-20 pounds. Joan did not respond well to chemotherapy, and by September 2007 she was "going downhill," had lost more weight and was in pain, and showed a "slow failure to thrive" because of the mesothelioma. By October 2007, she was "more symptomatic," which was "compatible with a very progressive mesothelioma." At the time of trial, February 2008, Joan was weak. She had difficulty walking and was using a wheelchair. She had a difficult time caring for Daniel.

The parties disputed whether the asbestos in GP's joint compound caused Joan's mesothelioma.

Plaintiffs presented the testimony of Dr. Eugene Mark, a Harvard-educated physician and pathologist who taught at Harvard Medical School. One of Dr. Mark's areas of focus was lung pathology. He had considerable expertise in asbestos diseases, including mesothelioma.

Dr. Mark testified that all types of asbestos, including the chrysotile asbestos used in GP's joint compound, caused asbestosis, lung cancer, and mesothelioma—and that this was the consensus of scientific authority. He further testified that if Joan breathed dust from Certain-Teed pipes, sanded Bondex asbestos-containing joint compound and swept up its dust, and sanded GP asbestos-containing joint compound and swept up its dust, all these exposures would be a substantial contributing factor in the development of her mesothelioma.[2] Dr. Mark stated that the asbestos in the dust caused Joan's mesothelioma, but it could not be determined precisely which product was the actual cause.

Dr. Mark testified that the scientific and regulatory agencies took the view that there was no safe level of exposure to chrysotile asbestos. If there was such a safe level, it is "so low that we do not know what it is."

[2] Joan testified that concrete pipe made by Certain-Teed was used in her company's construction, and that she occasionally would hold a pipe while Daniel cut it. The pipes apparently contained asbestos.

Dr. Mark testified that a "special exposure" to asbestos would be a contributing factor to mesothelioma. He did not testify that *any* exposure to asbestos would increase the risk of an asbestos disease. He hypothesized that a person walking down a street past an open manhole cover, beneath which someone was cutting into an asbestos-containing electrical cable, might be exposed to a few asbestos fibers—but he would not consider that a special exposure or a substantial contributing factor to asbestos disease. On the other hand, electricians who *repeatedly* work with asbestos-containing cables would have an increased risk of developing asbestos disease, and that would be a special exposure. He added that government regulations set increasingly lower levels of safe asbestos exposure as knowledge of the dangers increase, "but there is no safe threshold." He also clarified that the greater the exposure to asbestos, the more likelihood of someone contracting asbestos disease.

Dr. Mark testified that he learned the details of Joan's exposure to asbestos dust from her work history sheets, from speaking to Joan and her attorney, and from his general knowledge of the work practices of using joint compound in installing drywall—which included sanding, which creates dust, and sweeping the dust up. The sanding and sweeping creates exposure to the asbestos dust.

Plaintiffs also presented the testimony of Dr. Richard Lemen, a retired Assistant Surgeon General of the United States who holds a Ph.D. in epidemiology. Dr. Lemen was formerly the Deputy Director of the National Institute of Occupational Safety and Health, a part of the Centers for Disease Control and Prevention. He has substantial expertise in asbestos-related diseases.

Dr. Lemen testified that all types of asbestos cause mesothelioma, and that exposure to asbestos dust causes cancer. He testified that there is no identifiable safe concentration of exposure to asbestos below which individuals are not at risk. But he qualified that statement by noting that mesothelioma is a dose related disease, meaning the higher the exposure the higher the risk of contracting the disease. And he noted that people who only worked around asbestos briefly, or family members who may have washed clothes exposed to asbestos, had come down with mesothelioma. He also

testified that industrial exposure to asbestos, beyond background exposure, will increase the risk of cancer. He was aware of multiple studies showing that construction workers are at an increased risk for contracting mesothelioma.

GP presented the testimony of Dr. Kim Anderson, a human toxicologist. Dr. Anderson testified that exposure to chrysotile asbestos in joint compound did not cause mesothelioma. GP also presented the testimony of Dr. William Hughson, a pulmonologist. Dr. Hughson testified that chrysotile asbestos in joint compound can cause mesothelioma, but it would require "a lot of exposure." He did not believe Joan's exposure was sufficient. In Dr. Hughson's opinion, Joan's mesothelioma was caused by crocidolite asbestos in the Certain-Teed cement pipe. GP's joint compound was not, in his opinion, a substantial contributing factor of Joan's mesothelioma. He also testified that the concept of no safe level of asbestos exposure, which he called the "linear no-threshold model," was just "a model" and was "wrong."

As noted, the jury awarded plaintiffs damages of $20,050,000. The jury awarded $9,050,000 in damages to Joan: (1) $7 million in noneconomic damages for pain and suffering; and (2) $2,050,000 in economic damages, as follows: (a) $300,000 for past medical expenses and $900,000 for future medical expenses, for a total of $1.2 million for past and future medical expenses; (b) $79,000 for future lost Social Security benefits; (c) $193,000 for household services; and (d) $578,000 for spousal care, for care services she would have provided to Daniel, if able. The jury awarded $11 million to Daniel for past and present loss of consortium. The jury apportioned responsibility as follows: 30% to GP, 65% to other entities, and 5% to Joan. The jury found that GP did not act with malice or oppression, thus rejecting plaintiffs' request for punitive damages.

The jury returned its verdict on March 10, 2008.

After the verdict, the trial court reduced the award of past medical expenses to a stipulated amount of $90,000. The court applied a multiplier of three for future medical expenses, and derived the amount of $270,000. Taking into account the reduction of medical expenses, the percentage of Joan's and GP's responsibility, and other factors, including the settlements of cotortfeasors, the court computed the total economic

damages for Joan to be $889,544. Taking into account the percentage of GP's responsibility, the court computed the noneconomic damages for Joan to be $2.1 million, for a total damage award for Joan for $2,989,544; and the noneconomic damages for Daniel to be $3.3 million. Thus, the total damage award to plaintiffs was $6,289,544.

On March 28, 2008, the trial court entered judgment. GP stipulated to the entry of judgment, but reserved the right to challenge the entire damage award.

In April, GP filed a motion for new trial. Joan died in May 2008, while the new trial motion was pending. On May 28, 2008, the trial court denied the new trial motion.

II. DISCUSSION

GP makes one challenge to the jury's determination of liability and two challenges to the jury's determination of damages. With regard to liability, GP contends that plaintiffs failed to introduce sufficient evidence of causation. With regard to damages, GP claims the noneconomic damage award is the result of passion and prejudice due to alleged misconduct of plaintiffs' counsel during closing argument. GP also claims the trial court should have granted a new trial on the entire damage award, not just medical expenses. We disagree for the reasons set forth below.

A. Causation

GP contends that plaintiffs failed to introduce evidence sufficient to satisfy the "substantial factor" standard of causation set forth in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 (*Rutherford*). We conclude that plaintiffs' evidence of causation was sufficient to satisfy this standard.

In *Rutherford*, the California Supreme Court held that a plaintiff suing for asbestos-related latent injuries must first establish exposure to the defendant's defective asbestos-containing products, and then "must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of [her] injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford*, *supra*, 16 Cal.4th at p. 982 [original italics]; see *id.* at pp. 957-958.) In a lawsuit for damages caused by an asbestos-related cancer, "the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of

malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer." (*Id.* at pp. 982-983, original italics.) The court elaborated on the test, describing the reasonable medical probability of the exposure being "a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer . . . ." (*Id.* at pp. 976-977, original italics.)

Rutherford cautions that the term "substantial factor" evades precise definition, and that it is " 'neither possible nor desirable to reduce [the term] to any lower terms.' " (*Rutherford, supra,* 16 Cal.4th at p. 969, quoting Prosser & Keeton on Torts (5th ed. 1984) § 41, p. 267.) *Rutherford* articulated a partial, negative definition: that a force which plays only a *theoretical* or *infinitesimal* role in bringing about an injury or illness is *not* a substantial factor. (*Rutherford, supra,* at p. 969, italics added; see *People v. Caldwell* (1984) 36 Cal.3d 210, 220.) Consequently, the substantial factor standard "is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." (*Rutherford, supra,* at p. 978.)

At "a level of abstraction somewhere between the historical question of exposure and the unknown biology of carcinogenesis," *Rutherford* poses this question as defining the issue whether a particular plaintiff's exposure is the legal cause of her disease: "Taking into account the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed . . . , and perhaps other factors affecting the assessment of comparative risk, should inhalation of fibers from the particular product be deemed a 'substantial factor' in causing the cancer? [Citations.]" (*Rutherford, supra,* 16 Cal.4th at p. 975.)

GP argues that Dr. Mark did not consider the length, frequency, proximity and intensity of Joan's exposure to the asbestos-containing joint compound, and that his conclusion of causation was only hypothetical.[3]

GP takes too restrictive a view of Dr. Mark's testimony and the overall record.

Dr. Mark testified that he was familiar with the details of Joan's exposure to asbestos dust from her work history sheets, from speaking to Joan, and from his general knowledge of the work practices of using joint compound in installing drywall. These practices include sanding and sweeping, which create exposure to asbestos dust. (As we have noted, the details of Joan's exposure were presented to the jury through Joan's own testimony.) Viewing the evidence in the light most favorable to the verdict, we must conclude that Dr. Mark was sufficiently familiar with the operative facts of this case to render a competent opinion on causation.[4]

His use of hypotheticals was illustrative for the jury and does not mean that his *expert opinion* was hypothetical or that Joan's exposure was theoretical. Dr. Mark used the hypothetical of the person walking by the underground cable under repair to illustrate the difference between a casual (nonspecial) asbestos exposure and a special exposure, e.g., one involving repeated exposure due to industrial or construction work. He was also asked the hypothetical: if Joan sanded GP joint compound and cleaned up after the dust, would that be a substantial factor of her mesothelioma? Dr. Mark replied in the affirmative. Viewing the record as a whole, and the context of the hypothetical in the

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[3] We do not discuss GP's claim that the chrysotile asbestos in its product was less toxic than other forms of asbestos. The experts at trial had differences of opinion. Plaintiffs' experts testified that chrysotile causes mesothelioma, and we must view the evidence in the light most favorable to the verdict.

[4] It is true that, on cross-examination, Dr. Mark responded, "I don't know" when asked if he knew about Joan's asbestos exposure. But given the context of the questioning, and viewing the evidence in the most favorable light, Dr. Mark was merely admitting he had no *independent*, i.e., personal knowledge of the exposure. He described his knowledge of the exposure as derived from his review of the work history sheets, speaking to Joan and her attorney, all supplemented by his knowledge of work practices in the field.

presentation of plaintiffs' case to the jury, we must conclude that the hypothetical subsumed the facts—known to the jury—of Joan's individual exposure and the circumstances thereof. An expert may render an opinion based on facts stated in hypothetical questions, as long as the questions are based on the facts in evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 209.)

We note that *Rutherford* did not explicitly require that an asbestos plaintiff quantify the dosage of her exposure. The citations appended to the defining question of causation quoted above (*Rutherford, supra,* 16 Cal.4th at p. 975) are to two of our decisions which did not turn on quantification.

In the first decision, *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, we found asbestos exposure was a substantial factor based on the general information regarding the length and nature of plaintiffs' decedent's asbestos exposure, including the fact that the asbestos product produced clouds of dust when used. (*Id.* at pp. 835-837.) "In light of the evidence that . . . [decedent] participated in the dusty work of mixing [asbestos-containing] cement and that he assumed responsibility for cleaning up at the end of the day, the jury could infer that he was exposed to [the] product to such an extent that it was a substantial factor in bringing about his illness." (*Id.* at p. 837.)

And in *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, we found exposure was a substantial factor based on general evidence independent of disputed "quantification in 'fiber-years' of [plaintiff's] exposure"—evidence of plaintiff's work history, his many years of exposure to defendant's product, which was "prominent and prevalent" at his work site, and evidence that the product produced "visible dust reminiscent of a 'snow storm.' " This evidence "was sufficient to support a jury's inference that exposure . . . was a substantial factor" in causing plaintiff's asbestosis. (*Id.* at pp. 1419-1420.) [5]

[5] Likewise, in *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, the court engaged in some discussion of quantification (*id.* at pp. 999-1000), but noted that "plaintiffs presented detailed evidence at trial of the length and extent of [plaintiff's] exposure to defendant's product and based on this evidence the jury concluded that

Plaintiffs introduced substantial evidence that Joan was repeatedly, and in close proximity, exposed to GP's asbestos-containing product which produced clouds of dust which clung to the clothing and was inhaled. When we look at the totality of the record on causation, there is substantial evidence of causation, i.e., that the exposure was a substantial factor in causing Joan's mesothelioma.[6]

B. Alleged Attorney Misconduct at Closing Argument

GP contends that the award of noneconomic damages is excessive and must be reversed due to the alleged misconduct of plaintiffs' counsel during closing argument. GP identifies seven different categories of argument which it contends were improper and inflamed the passions of the jury. As we will note, GP did not object to much of the allegedly improper argument.

(1) Plaintiffs' counsel three times referred to GP's "army of lawyers." GP did not object to these references.

(2) Plaintiffs' counsel argued that "[GP] has met a lot of people, but they haven't met you yet, and don't you know that right now, at . . . 7:25 a.m., in Atlanta, Georgia, the 70th floor of that skyscraper, there are people with their phones near, with their e mail on, the people who couldn't come here, they are waiting to hear what you're going to say about what they've done. They are waiting to see if they can protect their money." GP

[plaintiff's] exposure to defendant's product was a substantial factor in causing his illness." (*Id.* at pp. 1000-1001, fn. 4.)

[6] Our conclusion that Dr. Mark's testimony regarding causation is not based on speculation resolves GP's claim that his testimony lacked foundation and should have been excluded under Evidence Code section 801. GP's other claim of section 801 exclusion, based on the studies relied on by Drs. Mark and Lemen, has not been preserved for appeal.

We note that GP also argues that plaintiffs based their showing of causation on a theory of "any exposure," i.e., that any exposure to asbestos is a legal cause of injury. This is the proverbial "straw man." Dr. Mark did not, as GP claims, testify that *any* asbestos exposure is causative of injury. This conclusion resolves GP's *Kelly/Frye* claim that Dr. Mark and Dr. Lemen's testimony should have been excluded because it depended on novel scientific methodology. Their testimony regarding causation was not anchored to a technique or process new to science.

objected that counsel was arguing beyond the scope of the evidence. The trial court overruled the objection: "I am going to allow pretty wide latitude in closing argument." But the court immediately admonished, "The jury will bear in mind what the evidence is."

Plaintiffs' counsel went on, without further objection, to argue: "Make no mistake about it. This is a very big important case, and we've got no idea how many people are waiting at the top of that skyscraper to hear what you're going to say about their money."[7]

(3) Plaintiffs' counsel made repeated requests to the jury to "fight [GP]" and to "help fight for people like" Joan. Counsel also asked the jurors to use "[y]our common sense, your passions about what's right and what's wrong, your sense of justice, about what companies can get away with for money . . . ." GP did not object to these requests.

(4) Plaintiffs' counsel spoke directly to Joan during closing argument. Counsel rhetorically asked the jury, "Who is the best witness to talk about what products were used?" He then answered himself, "The Mahoneys." He then turned to Joan and asked, "Mrs. Mahoney, who is the best witness to talk about what you used, you or the expert witnesses?" GP objected. The trial court responded, "Just rhetorical here," and told plaintiffs' counsel to resume. Shortly thereafter, plaintiffs' counsel asked Joan, "Is it fair that [GP] chose to make extra money by selling cancer causing joint compound at the cost of you losing your life? Is that fair?" Joan replied, "No." This passage is cited in the opening brief as improper argument—but GP did not object. Immediately after this passage, counsel asked Joan a variant of the same question. GP did not object—GP's

[7] GP's opening brief also cites to a page of the reporter's transcript where plaintiffs' counsel refers to GP's caring only about money, and a page where counsel again refers to "those people at the top of that skyscraper." GP objected to neither reference.

counsel just said, "Your honor?" On appeal, GP does not cite the variant question as misconduct.[8]

(5) GP contends that plaintiffs' counsel engaged in impermissible name-calling. GP refers to counsel calling GP "despicable"; "disgusting"; and "a very bad company." GP also points to a passage in which counsel implied, by referring to possible future proceedings "in a different type of court" than a civil court, that GP could face criminal charges. GP did not object to any of these references.

(6) GP contends that plaintiffs' counsel misled the jury into thinking that Dr. Mark's testimony was competent evidence of Joan's medical bills. There was no objection. GP also claims that counsel read from documents not in evidence purporting to show that the asbestos industry paid for the scientific studies underlying GP's defense. The passages cited in the opening brief do not indicate that counsel read from documents. At one point, he expressed his belief that GP's experts were wrong. GP objected, and the court cautioned plaintiffs' counsel about expressing his belief without basing that belief on the evidence. Counsel then stated his belief based on the evidence at trial. The court overruled GP's objection on the ground that counsel was making a fair argument from the evidence.

(7) Plaintiffs' counsel ended his argument with a plea to the jury to send a message to GP "regarding its money." GP did not object.

Any allegedly improper argument to which GP did not object cannot be considered on appeal as misconduct. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 (*Cassim*).) In their respondents' brief, plaintiffs point out GP's failure to object to most of the claimed misconduct. In its reply brief, GP argues that it objected eight times to alleged misconduct, and that further objections would have been futile. We have located GP's eight objections in the record; they have either been noted above or involve

[8] Plaintiffs' counsel then asked another question, referring to GP "send[ing] lawyer, lawyer, lawyer, lawyer, lawyer, lawyer to this courtroom . . . ." GP objected to the argument as going beyond the evidence. The court overruled the objection. The "lawyer, lawyer . . ." reference is not cited on appeal as misconduct.

matters not claimed on appeal as misconduct. And contrary to GP's claim, this is not a case of egregious, blatant, and repeated misconduct, left unchecked and uncontrolled by a trial judge, that would have justified a failure to continually object. In short, this case is not in any way comparable to the situation in *Love v. Wolf* (1964) 226 Cal.App.2d 378.

This leaves us with the "skyscraper" argument in (2), the single objected-to rhetorical question to Joan in (4), and the two arguments based on counsel's belief regarding GP's experts in (6) above.

Counsel is entitled to wide latitude in closing argument, and courts should not lightly restrain advocacy conducted within the bounds of propriety. (*Cassim, supra,* 33 Cal.4th at pp. 795-796; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798-799.) Generally, it is improper for counsel to argue facts outside the evidence, or to engage in derogatory or insulting remarks. (*Cassim, supra,* at p. 796.) The challenged arguments preserved for appellate review do not rise to the level of prejudicial misconduct.

The skyscraper argument was allowed over GP's objection, but the court immediately gave a curative admonition to the jury to consider only the evidence. Although it was misconduct to address his client, the single rhetorical question to Joan, which the trial court allowed, did not rise to the level of prejudicial misconduct. The arguments based on counsel's belief did not amount to misconduct—when counsel first appeared to argue from his own personal belief, he was appropriately cautioned by the trial court. When counsel then argued from his belief from the evidence presented, the court properly overruled the objection on the ground that counsel was entitled to argue fair inferences from the evidence. (See *Cassim, supra,* 33 Cal.4th at p. 795.)

Any doubt as to any impact of the challenged argument on the verdict is dispelled by examination of the remarks of the trial court in considering and denying GP's motion for mistrial based on improper closing argument. Obviously, the thrust of much of plaintiffs' counsel's argument related to the claim for punitive damages, i.e., counsel argued or implied that GP is a large, uncaring company, whose sole aim is to employ legions of lawyers to protect its money. The trial court noted that its concern about any

claimed misconduct was virtually "assuage[d]" by the jury's rejection of plaintiffs' punitive damages argument that GP acted with malice and oppression. The court observed that the jury's "rejection [of the punitive damage claim] in the light of [an] award of very substantial compensatory damages both economic and noneconomic both to Joan . . . and [Daniel] shows a very high degree of discriminating judgment on the jury's part . . . and diminishes almost to the vanishing point the possibility that they were driven by passion and prejudice." The court also observed, "This jury demonstrated really unusual independence and discrimination." The court also opined that it had "never seen a plaintiff who was as effective in communicating with the jury as" Joan.[9]

Viewing the entire record in light of these findings, and given the few references in closing argument actually before us, we cannot say the verdict was the result of any misconduct or of passion or prejudice of the jury. Counsel's overall argument did not rise to the level of prejudicial misconduct, and the trial court generally ensured that the jury maintained its focus on the facts of the case and their decisional duty as the trier of fact.

C. Damages

GP contends that plaintiffs failed to present sufficient evidence of Joan's actual medical expenses, necessitating a retrial on the entire damage component of the verdict—particularly noneconomic damages. We disagree. A new trial on the entire damage component was not necessary because, on the facts of this case, the award for medical expenses was not substantially inseparable from the issue of medical expenses. Accordingly, denial of a new trial on the entire damage component of the verdict was not an abuse of discretion.

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[9] GP claims the trial court characterized plaintiffs' closing argument as "beyond the permissible." It is not clear whether the court was actually characterizing the argument or stating GP's characterization of the argument. Elsewhere, the court took pains to note it was not calling any argument misconduct. In any event, the trial court's remarks, taken as a whole, show that any allegedly improper argument did not contribute to the verdict.

The evidence of Joan's exact medical expenses consisted of Dr. Mark's testimony regarding his review of Joan's medical bills. Based on his experience reviewing the clinical files and medical bills of mesothelioma patients, and his knowledge of the typical treatments administered and tests performed—which Dr. Mark testified involved "a certain standardization"—Dr. Mark gave his opinion that Joan's records "consisted of treatment options that are generally accepted in the medical and scientific community."[10] Joan's counsel posed a hypothetical question: if Joan's present medical bills amounted to about $300,000, was that a reasonable amount in Dr. Mark's opinion? Dr. Mark replied that the amount was reasonable. He testified he had reviewed the tests performed on Joan and the treatments administered, and opined "these figures are within the realm of what I've seen in other cases." He also testified that Joan's future medical expenses could be estimated as double or triple the amount incurred to date—i.e., the hypothetical amount of $300,000.

As noted, the jury awarded $1.2 million for past and future medical expenses. One possible derivation of this amount is (1) $300,000 for past medical expenses and (2) $900,000—triple that amount—for future medical expenses.

In its motion for a new trial, GP argued that plaintiffs had failed to document or otherwise present evidence of any of Joan's actual past medical expenses, resulting in a $300,000 award that was hypothetical and without evidentiary support. GP also contended the hypothetical amount of past medical expenses provided nothing for which a multiplier could be applied for future medical expenses, and led to an inflation of Joan's noneconomic damages for pain and suffering. GP insisted the hypothetical, unsupported figure for medical expenses "infected the verdict as a whole, resulting in an excessive and unprecedented award of non-economic damages."

The trial court agreed that "the record contains insufficient evidence to support an award by a reasonable trier of fact of past medical expenses . . . rendered by the jury

[10] Dr. Mark testified he had reviewed the clinical files of "a couple thousand" mesothelioma patients, but couldn't say how many sets of medical bills he had reviewed.

which was $300,000, or in the lesser sum set forth in the judgment made herein, that is $90,000." The court concluded that "there is no evidence from which the trier of fact could award any amount of past medical expenses incurred by" Joan. "Without question, the evidence supports the conclusion that [Joan] did incur medical expenses prior to the date of trial, and that those expenses were substantial, but no evidence permits any quantification of the amount of those expenses." And "[s]ince no evidence supports a determination of any amount of past medical expenses, there is no sum on which the multiplier can operate to fix future medical expense[s]."

The court granted GP's new trial motion conditionally, limited "solely and exclusively to the issue of that portion of economic damages sought by [Joan] which consists of past and future medical expenses . . . ." The court gave Joan's successors in interest the option of remitting the medical expense damages awarded in the judgment ($90,000 past expenses, plus $270,000 future expenses, or $360,000, less 5% for Joan's comparative fault, for a sum of $342,000), in lieu of retrying the issue of medical expenses. Joan's personal representatives accepted the remittitur. The judgment was reduced accordingly, and the new trial motion was denied.

GP argues that plaintiffs' failure of proof infected the entire damage award, and impermissibly influenced the substantial award of noneconomic damages. GP suggests a fixed link between economic and noneconomic damages, referring us to the general notion that medical expenses are the yardstick of damages for pain and suffering. But GP paints with too broad a brush. "In fact, there is no specific requirement that any special damages be awarded before general damages may be awarded. [Citation.]" (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078-1079 (*Westphal*).)

The issue here is simply whether the trial court erred by granting a new trial only on the issue of medical expenses, and not on the issue of the entire component of damages. GP agrees that the trial court has the power to grant a new trial on some issues, but not others, and a trial court's determination to grant a limited new trial is reviewed for abuse of discretion. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 285 (*Liodas*).) We

conclude the trial court in this case did not abuse its discretion by granting a new trial limited to the issue of medical expenses.[11]

GP relies primarily on *Liodas*. In that case, it was not clear whether the jury based liability on a theory of ordinary fraud or fraud by a fiduciary—when each theory of liability invoked a different measure of damages. (*Liodas, supra,* 19 Cal.3d at pp. 283-284.) The issue was whether a new trial limited to damages was proper when it could not be determined "on what basis liability was predicated. The trier of fact in any new trial would be required, prior to awarding damages, to decide whether [defendant] was acting in a fiduciary or nonfiduciary capacity." (*Id.* at p. 286.) Under that circumstance, a new trial limited to damages was an abuse of discretion because "the matter of liability is substantially inseparable from that of damages in the present posture of the case." (*Ibid.*)

Liodas is distinguishable. That case presented a clear-cut linkage between an uncertain basis of liability and the appropriate measure of damages. That is simply not the case here.[12]

In the present case, the issue of medical expenses is not substantially inseparable from the issue of damages as a whole, particularly noneconomic damages.

GP points to the trial court's comment at the new trial hearing that the testimony about the $300,000 "affected noneconomic damages." But GP quotes the court out of context. The court immediately proceeded to make this telling observation: "It simply is the case that the trier of fact had ample evidence before it, . . . quite apart from the medical expenses to determine to award the very, very substantial noneconomic damages to both Joan and Daniel Mahoney that they did. They had abundant evidence . . . of the pain and suffering and loss of consortium that had been suffered and was going to be

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[11] We note that "[w]e must uphold an award of damages whenever possible [citation] . . . ." (*Westphal, supra,* 68 Cal.App.4th at p. 1078.)

[12] GP also relies on a line of cases which are inapposite. *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306-309, and *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 641-644, simply hold that a tort plaintiff is limited to actual cost of medical care, and that a higher judgment, such as one for reasonable value of such care, may be reduced accordingly.

suffered in the future." The court also noted the jury's ability to draw conclusions from the testimony of Joan and her three children: "It was devastating testimony."

At a later point in the argument, the court observed that "there was no question" that the testimony of plaintiffs' witnesses showed "substantial expenses for medical care and treatment." The court then found that "the noneconomic damages, unlike perhaps the average case, were not a function of medical expense, economic damages, or probably economic damages in toto. [¶] The evidence . . . of pain, suffering, past and future was so strong that my conclusion would be the jury's award of noneconomic damages would have been the same, whatever the proof of medical expenses might have been."

In this case, the award of general damages stands on its own, amply supported by the testimony of plaintiffs' witnesses regarding the human tragedy that befell the Mahoneys. The grant of a limited new trial was not an abuse of discretion.

GP makes two ancillary challenges to discrete items of economic damages awarded by the jury. First, GP takes issue with the $578,000 for spousal care, awarded by the jury for the cost of services which Joan, due to her illness, could no longer provide for Daniel. GP contends the damages for spousal care are duplicative of Daniel's damages for loss of consortium. But damages for the cost of obtaining substitute domestic services are economic, and are distinct from the noneconomic damages of loss of consortium. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600.) Noneconomic damages for loss of consortium include the loss of the companionship, comfort, care, and assistance of the injured spouse, and are not intended to include the *economic* cost of obtaining spousal care services. (CACI No. 3920 (2009) & Use Note, pp. 752-753; see *Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408.) The jury in this case was so instructed.

Second, GP challenges the award of $193,000 for the value of Joan's services to the household. It appears that the jury awarded $578,000 damages for spousal care up to the projected date of Daniel's death, and a separate $193,000 of damages for Joan's services to the household from the period from Daniel's death to the end of Joan's life expectancy, minus two years. GP seems to argue there is no basis for an award for

household services because there is no longer a household after the death of Daniel. GP presents no direct authority for this contention. In any case, as we read the testimony of plaintiffs' forensic economist, the award for household services is for services Joan could no longer do for herself and had to hire someone to perform.

III. DISPOSITION

The judgment is affirmed.[13]

_____
Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Graham, J.*

[13] Plaintiffs' and GP's requests for judicial notice are denied.

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.